In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 851

E. M. PIPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Section 7203 of the Internal Revenue Code of 1954, which is set out at page 2a of the Appendix to the Petition, makes it a misdemeanor for any person willfully to fail to pay a tax or to make a return. After a jury trial, petitioner was convicted on a two-count indictment (R. 236–238)[1] of willful failure to file a federal excise tax return for the fourth quarter of 1959 (Count 1) and to pay the excise tax owed for that period (Count 2). He was sentenced to ninety days' imprisonment and fined $5,000 on Count 1, to be followed by a consecutive sentence of one year on Count 2. The latter sentence was suspended

[1] "R." references are to the mimeographed record filed in the court of appeals.

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and petitioner was placed on probation for a period of fifteen months (R. 240–242). The sole question raised on appeal and in this Court concerns the sufficiency of the evidence to support the jury verdict, a question that petitioner did not preserve by renewing his motion for acquittal at the close of all the evidence (see *Costner* v. *United States,* 271 F. 2d 261, 262 (C.A. 6), certiorari denied, 362 U.S. 952) and that does not warrant further review. In addition, the evidence was plainly adequate to sustain the conviction.

Petitioner imported and sold Volkswagen automobiles during the last quarter of 1959 (R. 134–135). These sales made him liable for the manufacturer's excise tax imposed by Section 4061(a)(2) of the 1954 Code. The return for the last quarter of 1959 should have been filed on or before January 31, 1960. It is not disputed that on December 17, 1959, an excise-tax agent told petitioner of his obligation to pay the tax, and that on January 18, 1960, another agent examined petitioner's records and determined that petitioner owed $89,672.59 on his sales of $1,103,871 for the fourth quarter of 1959 (R. 10–12, 20–22).

Petitioner agreed with the accuracy of the agent's computation but refused to file the return (R. 23–26). At a subsequent conference, petitioner explained that he would not sign a return because "he saw nothing to gain" by it and "he didn't want to agree to something that he couldn't pay and still stay in business" (R. 27, 37). An agent subsequently signed the return in petitioner's name pursuant to Section 6020(b)(1) of the 1954 Code (Pet. 1a), but petitioner

continued to refuse to pay the tax. He explained on a number of occasions that he had the money to pay it but that he would not, because it would leave him "broke" (R. 38, 46, 51). He freely admitted that he had sold his properties and had taken over $200,000 in cash to Canada to be placed in a lock box where it could not be reached by the government (R. 48–49, 60, 61). But, without disputing the correctness of the tax, he stated that he would rather go to jail than pay it (R. 79, 84).

In light of these facts, the present case involves the clearest possible example of a taxpayer's willful refusal to file a return or pay a tax. The jury was properly instructed that "an act is done 'willfully' if done voluntarily and purposely and with specific intent to do that which the law forbids; that is to say, with evil motive or bad purpose either to disobey or disregard the law" (R. 185). The instruction fully complied with this Court's decision in *Spies* v. *United States,* 317 U.S. 492, 497–498, and the facts indisputably sustain the jury's finding that petitioner had willfully and with evil motive disobeyed the law. It is hardly necessary to add that petitioner's willful disregard of the statute was not remedied by the Commissioner's filing of a return on petitioner's behalf under Section 6020(b)(1), an action taken months after petitioner's return was due and taken solely to form the predicate for attempts to collect the tax owing.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1965.

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